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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-125

ALAMO LAND & CATTLE CO., INC.,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE OF RESPONDENT

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Respondent, STATE OF ARIZONA, by and through the Attorney General of Arizona, prays that the writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, entered on March 28, 1974, be denied by this Court.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 495 F.2d 12 (1974). This decision was filed with the Court by petitioner as Appendix A to its petition. The decision of the Court below was filed March 28, 1974. Thereafter a motion for a rehearing was denied by the Court below on May 17, 1974.

The jurisdiction of this Court

could be properly invoked under 28 USC § 1254(1) 1966, which permits the United States Supreme Court to issue a writ of certiorari to the United States Court of Appeals. However, respondent submits that there has not been sufficient or good reason shown in the petition to justify this Court's accepting jurisdiction of the issues through issuance of a writ of certiorari.

STATEMENT

On May 31, 1966, the United States filed a notice of condemnation in the United States District Court, District of Arizona, and the Court entered an order of delivery of possession. Among the parcels included in the designation of taking were those designated as Tracts 304 and 305 which are part of the grant

to the State of Arizona by the United States under Section 24 of the New Mexico-Arizona Enabling Act. (Act of June 20, 1910, 36 U.S. Stat. 557, 568-579, Vol. 1, Arizona Revised Statutes, pp. 79-93). The lands were granted for support of the common schools and are subject to the specific restrictions of Section 28 of said Enabling Act.

On February 8, 1962, the land was leased by the respondent to the petitioner under a 10-year grazing lease. At the time of the taking, the land was being used for grazing purposes by the lessee.

On September 13, 1971, and February 11, 1972, respectively, the State of Arizona (Respondent herein, hereinafter referred to as "Arizona") and Alamo

separately stipulated with the United States of America, that full and just compensation for the taking of the property, together with all improvements thereon and appurtenances thereunto belonging, was the sum of $48,220 for Tract 304 and the sum of $70,400 for Tract 305, or a total of $118,600 (rounded) for said tracts, including improvements.

On March 3, 1972, a distribution hearing was held before the Honorable Walter E. Craig, United States District Court Judge. The only parties appearing and claiming an interest in the award were Arizona, claiming title through the above referenced Enabling Act grants, and Alamo, claiming a compensable leasehold interest in the land as well as a compensable interest in the value of the

improvements. Arizona conceded that as lessee Alamo is entitled to receive the value of the improvements, but contested the lessee's right to participate in the award for land value.

After the hearing and consideration of legal memoranda submitted by the parties the District Court entered an opinion and judgment awarding the State of Arizona the sum of $57,970 for its fee interest in the subject property and awarding Alamo the sums of $3,600 for its improvements and $57,049 for its lease-hold interest and reasonably prospective leasehold interest.

The State of Arizona appealed the opinion and judgment to the United States Court of Appeals for the Ninth Circuit, which by the opinion of the Court set

forth in 495 F.2d 12 (1974), reversed awarding the entire value of the land taken, $115,020, to the State of Arizona and $3,600 to lessee for the improvements concluding that Alamo had no compensable interest in the state school trust land.

REASONS FOR DENYING THE WRIT

1. The decision below which determined that petitioner does not have a compensable interest in state school trust property taken in condemnation does not conflict with the condemnation principle as evidenced in A.W. Duckett & Co. v. United States, 266 U.S. 149, 45 S.Ct. 38, 69 L.Ed. 216 (1924), for the reason that in condemnation proceedings a lessee is entitled to compensation for damage to his leasehold only if he can demonstrate that he has a compensable

interest in the property being condemned. Lessees of Arizona school trust lands do not receive a compensable interest in state land for the reason that the Enabling Act, as interpreted by Lassen v. Arizona, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967), states:

> The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given. First, it requires that before trust lands or their products are offered for sale they must be "appraised at their true value" and that "no sale or other disposal . . . shall be made for a consideration less than the value so ascertained. . . ."

87 S.Ct. at 588-589. (Emphasis supplied.)

Respondent submits that under the authority of the guidelines set forth

in the Lassen decision, federal condemnation procedures or direct sales to the federal government are a proper vehicle for the sale of state trust lands so long as the state is provided full compensation for the lands which assure the integrity of the trust.

A direct sale to the federal government is authorized under the Lassen case and under Arizona Revised Statutes (hereinafter cited as A.R.S.) § 37-232 which provides in part as follows:

> A person desiring to purchase state lands, or the lessee of any leased school or university land entitled to reimbursement for improvements thereon, may make a verified written application to the state land department.

Under this circumstance the sale would take place upon completion of an appraisal and a determination that the interest

of the state would not be prejudiced thereby, which under threat of condemnation would be at best highly unlikely. (A.R.S. § 37-236). In the event the land is sold, the lessee has no right to receive <u>any</u> portion of the sale price of the land, but is only entitled to receive the appraised value of the improvements which were placed on the property with the approval of the State Land Commissioner (A.R.S. § 37-242.A). Under this procedure the school trust account receives the full appraised value of the land being sold for public purposes. Had the federal government made application to purchase the land, the purchase price which the trust would have realized is $115,020. Any transaction, condemnation or otherwise, which

results in a lesser amount being deposited to the school trust account results in a sale or other disposal of lands from the trust at less than the true appraised value and is expressly prohibited by Section 28 of the Enabling Act and the Lassen case.

The only way the trust may be compensated for the full appraised value of the land would be for this Court to conclude, as the Ninth Circuit Court of Appeals concluded, that the lessee has no compensable interest in the trust property.

2. The decision below in determining that petitioner is not entitled to any compensation for its leasehold interest upon condemnation by the United States of America for another public

purpose does not conflict with Nebraska v. U. S., 164 F.2d 866 (8 Cir. 1947), cert. den., 334 U.S. 815 (1948).

Respondent concedes that this case which concluded that Nebraska school lands must be treated as any other private property and just compensation for such lands taken by condemnation must be allocated or apportioned between the state and a lessee on the bases of their relative values. The case was determined nearly 20 years prior to the Lassen case. Of particular interest is that the Nebraska case can be readily distinguished from the present because the Nebraska Enabling Act contains none of the restrictions on sale or disposal of school trust lands that are contained in Section 28 of the New Mexico-

Arizona Enabling Act.

Section 7 of the Nebraska Enabling Act, U. S. Stat. at Large, Vol. 13, p.47, provides as follows:

> And be it further enacted, That sections number sixteen and thirty-six in every township, and when such sections have been sold or otherwise disposed of by any Act of Congress, other land equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be and are hereby, granted to said state for the support of the common schools.

There are no other restrictions imposed on the sale or disposal of Nebraska school trust lands. With a lack of any congressionally imposed restrictions relating to the sale or disposal of the lands, the 8th Circuit Court's decision in Nebraska v. U.S., supra, appears to be correct and consistent with the Lassen case. The

decision as it affects Nebraska school land, in light of the congressionally imposed trust restriction on Arizona's school trust lands, and the Lassen decision, cannot have any application to disposal of Arizona school trust lands.

It is particularly interesting to note that while the Nebraska Enabling Act, supra, does not contain any specific trust restrictions on disposal or sale of the school property, a trust was nevertheless implied in the case of U.S. v. 7861 Acres of Land, 265 F.Supp. 564 (D. Neb. 1967), by applying the Lassen decision to the Nebraska school lands, by requiring the Bureau of Reclamation to pay for rights of way over Nebraska's school lands.

The trend of cases regarding the

restricted use of school trust lands appears to be moving toward strict enforcement of trust requirements. The instant case should not be an exception. The Nebraska case, supra, may be distinquished from the instant case without comment by this Court, and is not justification for granting writ of certiorari.

3. Even if the decision below concludes that the State must receive its full appraised value of the land by taking petitioner's suggestions that the state's lessee would not be precluded from receiving an amount that the leasehold has enhanced the value of the property beyond what it would have been otherwise had there been no lease. This contention, if not directly at least indirectly, was rejected in U.S. v. Fuller,

93 S.Ct. 801 (1973), wherein it was concluded that on the taking the grazing land which had an enhanced value as a result of actual or potential use in combination with Taylor Grazing "permit", the Fifth Amendment requires any compensation for any value added to fee lands by the permits which were revocable but by the Act's terms created no property rights.

Respondent suggests somehow that in a condemnation action involving a total take there are more elements in an award for damages than the value of the land and the value of the improvements. The case of State of Texas v. Harris County Houston Ship, C.N. Dist., 158 F.2d 861 (5 Cir. 1946) demonstrates this is an incorrect appraisal conclus-

ion. Therein the Court stated:

> . . . [i]t must be remembered that while, as between the condemner and the condemnee, the property is valued as a whole, as between the owners, the distributive portion of the whole value is to be determined as to each other obtaining when the taking occurs.
>
> 158 F.2d at 865.

This argument is not giving grounds for granting the writ of certiorari.

4. Petitioner argues that the fact that many citizens may be affected by the decision below for justification for this Court's accepting jursidiction through certiorari and also that if lessees are not entitled to compensation they will lose present financing. Since this Court in the Lassen case, supra, stated in unequivocal terms that the school trust must receive the full ap-

praised value of the lands taken out of the trust, respondent submits that the decision of the Court of Appeals is only a logical extension of the Lassen case and is not cause for panic by lessees. Admittedly, the decision will affect all school lands held in trust by the State Land Department and probably all school lands held in trust by the State of New Mexico. The effect of the decision, however, cannot be so broadly construed to include all trust lands granted to the various states by the federal government. The apparent reason for this is that each of the trust grants are subject to varying trust restrictions as has been demonstrated by distinguishing the Arizona trust from the Nebraska trust. By

its decision in the Lassen case, this Court has already determined the nature of the trust. The court below by rendering its decision is merely implementing the Lassen decision. No further review or comment is necessary from this Court. Petitioner suggests that the decision will affect the lessees'ability to mortgage their leasehold interest in state lands. Of course, under the specific terms of Section 28 of the Enabling Act no lien, mortgage or other encumbrance is valid against the respondent's interest in the land. However, the lessee's ability to mortgage the improvements on his land cannot be impaired by the decision for the reason that Section 28 of the Enabling Act

specifically recognizes the right of a lessee to have his value of improvements secured. Therefore the mortgage of any improvements is secure by reason that the lessee will be reimbursed for their value upon a subsequent sale of the property. On the other hand, if lending institutions are overextending credit to the lessees of school trust properties based on their "value" of the leasehold, the decision does not affect their security interest any more before the decision than it would afterwards. Any time the respondent determines that it is in the best interest of the trust to sell the property and does so by direct sale to a public agency or otherwise, the security interest is lost. The fact that lending institutions have overextended credit to lessees of state school trust

properties is not justification for depleting the trust in order to protect a secured interest which is at best questionable. The petitioner has failed to state grounds upon which the writ of certiorari should be granted.

CONCLUSION

Since this Court handed down its decision in Lassen v. Arizona, supra, the State of Arizona has made a concerted effort to bring about implementation of that decision. While the decision resolved the question of whether or not the trust must be compensated for state lands taken therefrom, it nevertheless created many questions specifically relating to condemnation procedures which must ultimately be resolved by a court of competent appellate jurisdic-

tion. The issue of whether or not a lessee has a compensable interest in state property is but one of the questions which must ultimately be resolved as a result of the Lassen case. Respondent submits that the decision rendered by the Ninth Circuit Court of Appeals is correct and accurately implements the dictates of this Court. There is no further reason or justification for this Court to make any further declarations concerning the nature of the Arizona school trust lands. It is therefore respectfully submitted that the decision of the United States Court of Appeals for the Ninth Circuit should stand and that the petition for writ of certiorari should be denied.

Respectfully submitted,

N. WARNER LEE
The Attorney General of
Arizona

CERTIFICATION

N. WARNER LEE, being fully admitted to practice before the Supreme Court of the United States, hereby certifies that three copies of the Response have been deposited in the United States mail, postage prepaid, addressed to:

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this 6th day of September, 1974.

N. WARNER LEE
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